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No. 03-1428

In The
Supreme Court of the United States

Supreme Court, U.S.
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CITY OF AUSTIN, MARIAN COLLINS, BARTON SPRINGS-EDWARDS AQUIFER CONSERVATION DISTRICT, and DAVID ROBERTSON,

Petitioners,

v.

NORMAN MINETA, Secretary of Transportation, MIKE LEAVITT, Administrator of Environmental Protection Agency, LES BROWNLEE, Acting Secretary of the Army, THE UNITED STATES, and LONGHORN PARTNERS PIPELINE, L.P.,

Respondents.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Fifth Circuit

REPLY TO FEDERAL AND LONGHORN PARTNERS PIPELINE BRIEFS IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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REPLY TO BRIEFS IN OPPOSITION

The City of Austin ("City"), Marian Collins, the Barton Springs-Edwards Aquifer Conservation District, and Professor David Robertson (collectively, the "Collins petitioners") reply to the Brief for the Federal Respondents in Opposition ("Federal Opp.") and the Brief of Respondent Longhorn Partners Pipeline, L.P., in Opposition to Petition for a Writ of Certiorari ("Longhorn Opp.").

The elaborate lengths to which the government has gone to avoid conducting an EIS for the Longhorn Pipeline project exemplifies the problems noted by Justice Breyer when he wrote for the First Circuit in one of the leading NEPA decisions, *Sierra Club v. Marsh*, 769 F.2d 868 (1st Cir. 1985). After noting the practical wisdom of agencies' simply going ahead and performing an EIS, instead of working so hard and at such length to stop at an EA,[1] Now-Justice Breyer's opinion explains that "an EA and an EIS serve very different purposes." 769 F.2d at 875. An EA's job is to "identify" potential impacts, not to "balance" and "weigh" the impacts against other project objectives. The EIS is the decision tool for the latter job. *Id.*

In recent years, NEPA practice in the federal bureaucracy has evolved to the point that it now lumps the purposes of two different NEPA phases – *identification* of impacts for the EA phase; *balancing* of impacts with other objectives for the EIS phase – into a single phase, through the NEPA hybrid known as a mitigated FONSI. The Court never has provided guidance on the standards that should

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[1] This wisdom is echoed in a later article by a former CEQ general counsel: Discussing an agency practice of performing EAs that have the look and feel of EISs, she criticizes as "unfortunate" the rationale that doing so "avoid[s] as much public involvement as an EIS would stimulate." D. Bear, *NEPA at 19: A Primer on an "Old" Law with Solutions to New Problems*, 19 ENV. L. REP. 10060, 10063 (1989). She concludes that, instead of "being prepared to turn the EA into an EIS rapidly" if directed by a court, agency officials "would be far better advised to simply proceed with circulation of the document as an EIS." *Id.*

govern use of this now commonplace aspect of NEPA administration. And, the CEQ itself notes its continuing uncertainty about how to treat the addition of mitigation measures in the EA phase to bring the level of expected impacts below the significance level. *See* NEPA's Forty Most Asked Questions, at http://ceq.eh.doe.gov/nepa/regs/40/30-40.HTM#39.

I. The legality of mitigated FONSIs is *not* at issue in this case; instead, the issue is what standards govern agency use of mitigated FONSIs and whether a mitigated FONSI can be used as a policy-making device that evades NEPA's procedural safeguards.

Both the Federal Respondents and Longhorn fundamentally mischaracterize the central issue presented to the Court. Contrary to the misleading reformulations of questions presented,[2] the validity of mitigated FONSIs *vel non* is not challenged. That could hardly be done, since the first-phase settlement agreement contemplated the *possibility* of a mitigated FONSI for the Longhorn project.[3]

Instead, the questions are what standards govern the use of mitigated FONSIs and does NEPA permit agencies to shift their policy determinations on projects from the statutorily-designated locus at the end of the EIS phase to the bureaucratically-devised mitigated FONSI phase.

Mitigated FONSIs are not grounded in either NEPA's text or CEQ's binding NEPA regulation but, instead, arise

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[2] *See* Federal Opp. at (I) (first reformulated question) *and* Longhorn Opp. (unnumbered opening page, second reformulated question).

[3] Longhorn, however, has no basis whatever for positing that the parties contemplated a mitigated FONSI as a "likely outcome" of the process. *See* Longhorn Opp. at 4. That Longhorn was made privy to the government's hidden agenda to avoid an EIS is a far cry from the City and the Collins petitioners being aware or supportive of the plan. They were not.

from bureaucratic experience and practice.[4] The significant legal problem they create is not in their existence, however tenuous, as bureaucratic devices; instead, it is in the practical administration of applying the mitigated FONSI concept to actual projects subject to NEPA inquiry. At this critical level of practical NEPA administration, the use of mitigated FONSIs is virtually standardless and subject to manipulation to advance hidden policy objectives. That is why this case raises such critical issues for enforcement of a cornerstone of federal environmental law.

Operating in a legal vacuum, with no written law, regulation, or policy guidance, the federal agencies have set themselves adrift without written legal guidance and are increasingly using the mitigated FONSI concept as a way to pack environmental policy choices into NEPA's EA phase. Whether this transformation of NEPA practices is good policy is not the issue and is not addressed here. The point is that it has resulted in rapidly increasing curtailment of the use of EISs, which in turn means that the main procedural right afforded NEPA plaintiffs (who have *only* procedural rights) is disappearing without the courts even noticing – and without establishment of clear standards by the courts.

That the standards guiding agencies in their use of mitigated FONSIs are muddled and uncertain is thrown into relief by the various arguments in the opposition briefs of the government and Longhorn. The government emphasizes the Longhorn FONSI's conclusion that the

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[4] The leading NEPA treatise correctly explains that the CEQ regulations do not address the role of mitigation when agencies choose not to prepare EISs. Daniel R. Mandelker, NEPA LAW AND LITIGATION, § 8.08[10] (2d ed. 1995). Neither the Federal Respondents nor Longhorn makes any effort to refute this point. The government cites the standard CEQ regulations for the basic proposition of what a FONSI is, but then, in the next sentence, when it turns to what a *mitigated* FONSI is, cites only case law – and non-Supreme Court case law at that. Federal Opp. at 3.

Longhorn mitigation measures would make it safer than the old pipeline and "similar pipelines," Federal Opp. at 7, while ignoring the fact that NEPA does not ask whether a project will be comparatively better than it would otherwise have been but, instead, what its impacts will be and whether they may be "significant." A project that may cause significant environmental impacts requires an EIS, regardless of whether it is going to be a good or worthwhile project.

Longhorn's argument suggests yet another, and different, factor supporting a mitigated FONSI: the actual intent of those invoking NEPA's procedural protections. *See* Longhorn Opp. at 2 & n.1 (deriding "result-oriented" nature of NEPA challengers).[5] Yet, subjective motivation – of either NEPA plaintiffs or federal agencies – should play no role in evaluating the *bona fides* of a mitigated FONSI determination.

The government touts the benefits of mitigated FONSIs in avoiding expense and delay, Federal Opp. at 8, but that cannot be the standard for validating mitigated FONSIs. Otherwise, the NEPA process would *always* stop at the FONSI stage because it is always cheaper and faster to stop and not perform an EIS.

Both the government and Longhorn attack the aggregation of environmental impacts[6] the government itself

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[5] Longhorn, though, wants this kind of subjective inquiry to be only a one-way street. While repeatedly impugning the motives of the City and the Collins petitioners, Longhorn vehemently rejects the propriety of any inquiry into the subjective motivations of the federal agencies. Longhorn Opp. at 14. The City and the Collins petitioners have gone into the facts surrounding the federal agencies' masked pre-determination to avoid an EIS, not in order to show bad faith, but instead to highlight the fact that the agencies were determined to cram a policy-driven decision into the NEPA product (the FONSI) that is supposed to be fact-driven.

[6] Statistically correct aggregation of the government's own estimated probabilities of environmental harm results in there being an 18.3% probability of meaningful environmental harm from the pipeline's operation, even after mitigation measures are added in. *See* Pet. for Cert. at 7-8 & n.8.

concluded were probable results of operation of the mitigated version of the pipeline. Federal Opp. at 7 n.2; Longhorn Opp. at 23-24. Since neither offers even a modicum of technical support for its statements, and since the aggregation conforms to accepted statistical techniques outlined in the administrative record, the opposition's arguments can only be interpreted as opposition either to the very concept of taking *cumulative* impact into account at the mitigated FONSI stage or to the proposition that an 18.3% chance of predicted environmental harm does not equate to "significance."[7] But cumulation of harms is required at every stage of NEPA, including the mitigated FONSI stage,[8] and an 18.3% chance of harm, by any objective standard, surely must be "significant" under NEPA, even at the mitigated FONSI stage.

Finally, both the government and Longhorn exhibit confusion over the role of policy-making at the mitigated FONSI stage by confusing the role played by CEQ in the NEPA process in general and the mitigated FONSI stage in particular. In response to the argument that CEQ's stepping into the EA process to terminate the process means that the mitigated FONSI was policy-driven

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[7] The government defends the agencies' "subjective judgment call" on the significance of these risks. Federal Opp. at 8. Yet, it never explains why this subjective call is anything other than a policy determination. The closest it comes is its citation of *City of New York v. United States Department of Transportation*, 715 F.2d 732 (2nd Cir. 1983), *cert. denied*, 465 U.S. 1055 (1984), for the proposition that agencies have wide latitude in making significance determinations. The probabilities of adverse environmental impact involved in the NEPA decision in *City of New York* were infinitesimal compared to the ones involved in the Longhorn pipeline scenario. One chance in several million of harm is much more easily categorized as insignificant than nearly a 1 in 5 chance (the case here).

[8] *See, e.g., Kern v. United States Bureau of Land Management*, 284 F.3d 1062, 1076 (9th Cir. 2002) ("adequate consideration of cumulative effects requires that EAs address them fully," quoting 1997 CEQ publication).

instead of fact-driven, Longhorn plaintively complains that surely it must be conceded that CEQ is either the voice in NEPA "policy matters" or it is not. Longhorn Opp. at 16. But that makes the very point urged here: what CEQ forced into the square hole of the EA/FONSI phase was the round peg of a policy decision that belongs in the EIS/ROD phase of the NEPA process. Longhorn's argument is coherent only if it is assumed that mitigated FONSIs somehow change the rule and permit policy choices to be made in a truncated NEPA process that avoids EISs altogether. And, if that is to be the rule, then it should not be adopted through subterranean bureaucratic efforts but, instead, only after this Court, Congress, or CEQ through formal regulation has spoken on whether NEPA law is to be so transformed.

The government similarly has a curious defense of CEQ's intervention to pretermit the NEPA process. *See* Federal Opp. at 10-11 n.3. It cites a series of cases, regulations, and executive orders about the propriety of what CEQ did here. Yet, on examination, not a single one of the cited authorities addresses intervention to force a FONSI (mitigated or not) on a single-project basis.[9] They speak only generally of the central policy role played by CEQ, principally through its promulgation of the regulations broadly governing the NEPA process.

Thus, the arguments of the government and Longhorn reflect that, underneath the rote recitation of "arbitrary and capricious" as the standard for mitigated FONSIs, there lurks either confusion about what standards apply to evaluation of the special creature called mitigated FONSIs or, more worrisome, an assumption that the only standards that apply are *ad hoc* ones chosen by the agencies on

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[9] CEQ's NEPA regulations addressing federal agency invocation of CEQ intervention do not address the intervention situation in this case. *See* 40 C.F.R. §§ 1504.1-1504.3.

a project-by-project basis, without any acknowledgement of written guidance in law and regulation.

In either event, federal agency implementation of NEPA in the mitigated FONSI context is in a legally rudderless state. The Court has never provided any guidance on the standards for when mitigated FONSIs are legally acceptable. They now have become the principal device for NEPA decisionmaking in the government. This case squarely presents the issue of what standards are to govern their use, and the Court should use this opportunity to clarify the NEPA process on this important matter.

II. The standards for mitigated FONSIs that have been articulated by the lower appellate courts vary widely, contrary to their characterization by the government and Longhorn.

The government cites a long string of circuit court decisions upholding mitigated FONSIs under the arbitrary and capricious standard, suggesting that there is uniformity in the courts below and, thus, no need for the resolution of circuit conflict or confusion. Federal Opp. at 9-10; *see also id.* at 11 & n.4 (arguing that *National Audubon Society v. Hoffman*, 132 F.3d 7 (2nd Cir. 1997), is not in conflict with Fifth Circuit decision in this case). Longhorn argues that the standard for review of mitigated FONSIs has been "uniformly applied." Longhorn Opp. at 18. The reality is to the contrary. *See* NEPA's Forty Most Asked Questions, at http://ceq.eh.doe.gov/nepa/regs/40/30-40.HTM#39 (noting that "[c]ourts have disagreed with CEQ's position in Question 40").

The circuit court decisions that the Federal Respondents and Longhorn rely upon – aside from ritual invocation of the arbitrary and capricious standard – reflect, in fact, a wide array of standards for evaluating the legality under NEPA of a government agency decision to stop at a mitigated FONSI. The District of Columbia Circuit, in one of the most frequently cited of the mitigated FONSI cases,

concluded that a mitigated FONSI is acceptable if the mitigation "*completely* compensate[s] for *any possible* environmental impact." *Cabinet Mountains Wilderness v. Peterson*, 685 F.2d 678, 682 (D.C. Cir. 1982) (emphasis added). The Fourth Circuit permits agencies to stop at mitigated FONSIs if the mitigation "eliminates *all* significant environmental effects[.]" *Roanoke River Basin Ass'n v. Hudson*, 940 F.2d 58, 62 (4th Cir. 1991) (emphasis added), *cert. denied*, 502 U.S. 1092 (1992). In a contrasting standard expressly acknowledged by the Fifth Circuit, the Second Circuit held that when the question of whether the mitigation measures will eliminate any significant impact is a "close call," the government cannot stop at a mitigated FONSI but must proceed to an EIS. *National Audubon Society*, 132 F.3d at 13. The Eighth Circuit upheld a district court's rejection of a mitigated FONSI, requiring that, not only must the government give the requisite "hard look," but then must not "ignore what it saw." *Audubon Society v. Dailey*, 977 F.2d 428, 62 (8th Cir. 1992). The Ninth Circuit requires that the analysis of mitigated FONSIs distinguish between mitigation measures whose efficacy was attacked during the public comment period and those that were not. *Greenpeace Action v. Franklin*, 14 F.3d 1324, 1335 (9th Cir. 1992).[10]

In the circumstances of this case, the Fifth Circuit's express rejection of the Second Circuit's "close call" standard for mitigated FONSIs creates a plain conflict.[11]

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[10] The government also cites an Eleventh Circuit case, *C.A.R.E. Now, Inc. v. FAA*, 844 F.2d 1569 (11th Cir. 1988), in support of its argument that the standard for mitigated FONSIs is well-settled. Federal Opp. at 9. That case upheld a mitigated FONSI, but discussed only the role of "alternatives" analysis, not how mitigation measures might come into play to avoid the necessity of an EIS. *See* 844 F.2d at 1574.

[11] The government argues that the Fifth Circuit's observation that its decision conflicted with the Second Circuit's standard is dictum because the Fifth Circuit never determined that this case, in fact, presents a close call. Federal Opp. at 11 n.4. That is a fatuous argument. It assumes either that the Fifth Circuit had to have implicitly

(Continued on following page)

Moreover, the reality is that the conflict is not simply with the formulation of the Second Circuit's standard but also with the District of Columbia's (which requires complete compensation for any possible impact) and probably the Fourth Circuit's as well (which requires elimination of "all" significant impacts).

Whatever may be the conclusion about whether a mitigated FONSI was appropriate here, it cannot be seriously argued that this case does not present a close call on the question of significance. The two lead agencies themselves publicly split on this question after two years of study. They also acknowledged the uniqueness and importance of the dispute and the NEPA issues it presented. Even after CEQ effectively forced them to agree, their joint FONSI still reflects an *18.3% risk* of harmful environmental impacts. They negotiated at length with Longhorn, behind closed doors, for more than a year, going through twenty-one iterations of a mitigation plan in an effort to avoid an EIS.

It is plain that, had this case arisen in the Second Circuit, the "close call" standard that is applied there, but not in the Fifth Circuit, would have resulted in invalidation of the mitigated FONSI. The Court should take this case to determine what standard the circuits must use to evaluate mitigated FONSIs. The current reality is that there is not a settled and determinable standard for evaluating mitigated FONSIs that project applicants, project opponents, federal agencies, or the lower courts can use in this important area of the law.

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concluded that this case did not present a close call or that, as a factual matter, this case does not present a close call. There is no basis for assuming the Fifth Circuit implicitly decided this case does not present a close call, and the facts of this case, as detailed in the text of this response as well as in the certiorari petition, demonstrate that, at a very minimum, it is a very close call indeed.

CONCLUSION

The petition for writ of certiorari should be granted.

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